

NO. 50235-6-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

THURSTON COUNTY SUPERIOR COURT NO. 17-2-00906-34

BRELVIS CONSULTING, LLC,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

APPELLANT'S OPENING BRIEF

Peter Offenbecher, WSBA No. 11920
Erin Curtis Newton, WSBA No. 38029
SKELLENGER BENDER, P.S.
1301 Fifth Avenue, Suite 3401
Seattle, WA 98101
(206) 623-6501

Attorneys for Brelvis Consulting, LLC

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I. INTRODUCTION

This case presents two issues of first impression. The Washington State Attorney General's Office sought to compel Appellants, through Civil Investigatory Demands ("CID"), to answer questions and provide documents in violation of the state and federal constitutional privilege against self-incrimination, and the state and federal constitutional prohibition against unreasonable searches and seizures. After Appellants, through counsel, failed to provide the information sought by the State in the CID, the State filed a Petition to Enforce Civil Investigative Demand ("Petition"). The trial court granted the State's Petition, but noted that Appellant's response presented novel legal issues.

The trial court erred. Compelling compliance with the CID violates Appellants' fundamental rights protected by the Fifth Amendment to the United States Constitution; Article I, Section 9 of the Washington Constitution; RCW 10.52.090; the Fourth Amendment to the United States Constitution; and Article I, Section 7 of the Washington Constitution.

The State cannot use the CID to conduct an end run around the provisions designed to protect our most fundamental constitutional rights. This Court should reverse the trial court decision and vacate its order compelling compliance.

II. ASSIGNMENTS OF ERROR

1. The Trial Court Erred in Granting the State's Petition to Enforce the CID Because Responding to the CID Would Violate the Rights Against Self-Incrimination of Brelvis and Bruce Mesnekoff Protected by the Fifth Amendment to the United States Constitution; Article I, Section 9 of the Washington Constitution; and RCW 10.52.090.
2. The Trial Court Erred in Granting the State's Petition to Enforce the CID Because the CID also Compels an Act of Production in Violation of the Fifth Amendment; Article I, Section 9 of the Washington Constitution; and RCW 10.52.090.
3. The Trial Court Erred in Granting the State's Petition to Enforce the CID Because a *Gunwall* Analysis Favors Finding that Article I, Section 9 Provides Greater Protections than the Fifth Amendment in this Context.
4. The Trial Court Erred in Granting the State's Petition to Enforce the CID Because Compelling Compliance with this CID—the Answering of Interrogatories and Production of Documents and Papers—Would Violate RCW 10.52.090 Because it Would Subject Mr. Mesnekoff and Brelvis to Penalties and Forfeitures, a Result Clearly Prohibited by the Statute.
5. The Trial Court Erred in Granting the State's Petition to Enforce the CID Because the CID is an Unreasonable Search and Seizure in Violation of the Fourth Amendment to the United States Constitution and Article I, Section 7 of the Washington Constitution.
6. The Trial Court Erred in Granting the State's Petition to Enforce the CID—and in Denying Appellant's Motion for Reconsideration—Because Brelvis and Mr. Mesnekoff Do Not Forfeit their Constitutional Rights By Failing to Bring a Petition to Set Aside Within the 20-Day Time Period Set Forth in RCW 19.86.110.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where the Fifth Amendment to the United States Constitution; Article I, Section 9 to the Washington Constitution; and RCW 10.52.090 all protect the fundamental constitutional and statutory privilege against self-incrimination, can the State Attorney General's Office compel a person to provide evidence against himself under the auspices of a "Civil Investigative Demand"?
2. Where RCW 10.52.090 prohibits a court from compelling the answering of questions or the production of documents that might incriminate a person, or which might subject the person to a "penalty or forfeiture," unless the compulsion order is accompanied by a grant of immunity, did the trial court err when it granted the State's Petition to Enforce Civil Investigative Demand without granting Appellants immunity?
3. Where longstanding state and federal law agree that the privilege against self-incrimination applies not only in criminal proceedings, but also in any official proceeding—including civil, administrative, judicial, investigatory, or adjudicatory—did the trial court err when it granted the State's Petition, which compels Appellants to respond to civil investigatory interrogatories and requests for production issued by the State Attorney General's Office?
4. Where the CID sets forth 12 interrogatories directed at Mr. Mesnekoff and Brelvis, and includes a litany of inquiries about all aspects of Brelvis's business activities, including steps taken to ensure legal compliance, and is issued by a State investigatory and prosecutorial authority, does compelling compliance with the CID implicate the core values that the privilege against self-incrimination protects?
5. Where the preponderant weight of modern authority agrees that the fundamental privilege against self-incrimination applies to both entities and individual persons, does compelling Brelvis and its Member Manager, Mr. Mesnekoff, to comply with the CID violate their privileges against self-incrimination?

6. Where the act of responding to the CID's request for documents would require Mr. Mesnekoff and Brelvis to admit certain testimonial facts, such as regarding the existence, authenticity, and possession of evidence, did the trial court err in granting the State's Petition because the CID compels an act of production in violation of the state and federal constitutions and RCW 10.52.090?
7. Where a *Gunwall* analysis favors finding that Article I, Section 9 of the Washington constitution provides greater protections than the Fifth Amendment, did the trial court err in granting the State's Petition even if the federal constitutional provision was not violated?
8. Where the record is clear that the State Attorney General's Office is attempting to compel Appellants to produce information in order to "subject him...to a penalty or forfeiture," did the trial court err in granting the Petition without granting Appellants immunity, as required by RCW 10.52.090?
9. Where the CID seeks compulsion of business records in the possession of a private business, without the issuance of a warrant or a finding of probable cause by a neutral and detached magistrate, did the trial court err in granting the State's Petition because the CID is an unreasonable search and seizure in violation of the Fourth Amendment and Article I, Section 7?
10. Where the CID statute provides that a person "may" file a petition to set aside the CID within 20 days, do Appellants forfeit their fundamental constitutional rights, thereby subjecting themselves to compelled self-incrimination, by failing to bring such a petition within the stated time window?

IV. STATEMENT OF THE CASE

A. The State's Investigation of Brelvis

Brelvis Consulting, LLC, is a Florida limited liability company with its principal place of business located in Wesley Chapel, Florida. Brelvis Consulting, LLC, also does business as the Student Loan Help. CP 4. Brelvis assists consumers with federal student loan consolidation preparation services. Bruce Mesnekoff is the owner, manager, and agent of Brelvis. CP 4.

The Office of the Washington Attorney General is conducting an investigation “that relates to misrepresentations about student loan forgiveness, as well as potential violations of Washington’s Debt Adjusting Act and Consumer Protection Act.” CP 5.

B. The State Issues the Civil Investigative Demand

On October 21, 2016, the State served a 16-page Civil Investigative Demand (CID) on Bruce Mesnekoff and Brelvis Consulting, consisting of 12 Interrogatories and 13 Requests for Production. CP 18–38.

The CID sets forth 12 Interrogatories directed at Mr. Mesnekoff and Brelvis, and includes questions inquiring as to Brelvis’s corporate structure; the products and services offered; the source of leads for prospective clients; a list of every Washington consumer and the products or services provided; all owners, members and shareholders; the persons responsible for drafting

and approving contracts with Washington customers; the persons responsible for determining and approving the amount of fees in Washington; identifying all Washington consumers who have formally or informally complained about the products and services; all current and former employees, agents, salespersons, and contractors; persons responsible for drafting and approving sales and marketing strategies; all steps taken to ensure compliance with local, state, and federal laws; and all steps taken to ensure all statements to potential customers are truthful. *See* CP 24–27.

The CID also includes 13 requests for production of a wide variety of documents, including: contracts, client intake sheets, and questionnaires; employment applications and resumes of all owners, member, shareholders, and employees; all written correspondence to and from consumers; all documents related to any Washington consumers who have formally or informally complained about the services provided; all recordings and documents related to oral or telephone communications with Washington consumers, including call logs, recordings, and notes; all documents related to any advertising by the entity; all telemarketing scripts used in the course of selling products or services; all payment records for consumers for payment records made; and a variety of other documents. CP 28–31.

The CID was directed to, and served upon, both Brelvis and Bruce Mesnekoff:

THE STATE OF WASHINGTON TO:	Brelvis Consulting, LLC 2660 Cypress Ridge Blvd., Ste. 101 Wesley Chapel, FL 33544
	and
	c/o Bruce Mesnekoff 27203 Fern Glade Ct. Wesley Chapel, FL 33544

CP 18.

Paragraph 3.9 of the CID explains that the Interrogatories and Requests for Production are directed not only at the Brelvis entity, but also at the individual persons who are “its principals,” “present or former owners, employees,” “officers, directors, agents, representatives,” “and any other persons or entities acting on behalf of” “Brelvis Consulting.” CP 20. Bruce Mesnekoff is the Managing Member of Brelvis, as indicated by the “MGRM” notation on the Florida Department of Corporations website. *See* CP 235–36.

Mr. Mesnekoff obtained Florida counsel, who communicated with the State about responding to the CID. CP 42–48.

On November 26, 2016—36 days after the CID was issued—the State received a single customer complaint about The Student Loan Help

Center, one of Brelvis's "DBA" names. CP 96–98.¹ On December 6, 2016, the State sent this single complaint to The Student Loan Center, and requested a response. CP 100. The letter from the State accompanying the complaint stated:

Our office provides an informal complaint resolution process to consumers and businesses to assist them in resolving disputes. Many businesses find this informal, voluntary process beneficial in resolving complaints with their customers.

Our office acts as a neutral party throughout this process and facilitates communication between consumers and businesses to assist the parties in resolving the complaint.

CP 100. Mr. Mesnekoff promptly responded to this complaint, per the State's request. CP 233.

Thereafter, Mr. Mesnekoff engaged new counsel, who continued to communicate with the State regarding the pending CID, but ultimately no response to the CID was submitted.

C. Petition to Enforce the CID in Thurston County Superior Court

On February 24, 2017, the State commenced an action in Thurston County Superior Court to enforce the CID by filing a "Petition To Enforce

¹ In its Reply memorandum in the court below, the State, for the first time, provided notice of one other telephone complaint from a person who was not a customer of Brelvis, who never paid any money to Brelvis, nor ever engaged the services of Brelvis. CP 159–61. This person was apparently just complaining about receiving a cold call on the telephone. CP 159–61. Mr. Mesnekoff is not aware that any other complaints have been made to the Attorney General about Brelvis. *See* CP 178 at n.1.

Civil Investigative Demand Pursuant To RCW 19.86.110.” (hereafter “Petition”) CP 4. Brelvis Consulting LLC and Mr. Mesnekoff filed a response in opposition to the petition to enforce CID. CP 4.

On March 24, 2017, a hearing on the merits of the petition was held in Thurston County Superior Court, the Honorable James J. Dixon, Presiding. The trial court granted the State’s petition to enforce the CID, but recognized that this case presented a novel issue:

THE COURT: Thanks. I was suspecting that that would be your reply when I heard Mr. Nelson say that. And if the Court would allow you to respond to Mr. Nelson’s argument regarding the position of the Attorney General, that denying their motion would preclude or estop the State from conducting an investigation, I anticipated your argument would be, well, that’s not accurate, because they can conduct a criminal investigation as any other sort of typical criminal investigation would transpire. You do an investigation. But that does not necessarily mean that the State of Washington has the authority to demand discovery. And I’m not being very articulate here. You would be more articulate than I am.

It is a novel issue. The court has reviewed the statute very carefully, has reviewed the pleadings, except for the pleading that was filed by Mr. Offenbecher this morning. So I haven’t looked at that. The Court is going to grant the motion of the State over the objection of the Respondent. The Court finds that the request for discovery being sought by the State does not implicate or constitute an unreasonable search under either the Fourth Amendment, the Fifth Amendment, Article I, Subsection 7 of the State Constitution. The Court finds that the definition of “person” as it applies to this particular statute includes the Respondent, Brelvis Consulting, LLC. The Court finds that the Respondent did not move to set aside the petition within 20 days, as is required by the statute. The Court grants the motion of State of Washington.

RP 23–24.


The trial court also entered a written order “that the State of Washington’s Petition to Enforce Civil Investigative Demand is GRANTED.” CP 171–175.

Brelvis Consulting LLC and Mr. Mesnekoff filed a motion to stay the trial court’s order pending decision on appeal, and a Reply the State’s Response. CP 259, 336. After a hearing, the trial court granted the motion for stay of its compulsion order, stating that the issues to be presented in the appeal are “meritorious and debatable and that they may be issues of first impression.”

ORDERED that Respondent’s Motion to Stay Order Compelling Answers to Interrogatories and Requests for Production is GRANTED in order to maintain the status quo while the Court of Appeals resolves the issues presented by the appeal.

The Court finds that the issues to be presented by the appeal are meritorious and debatable and that they may be issues of first impression.

DATED this 1 day of May, 2017.



The Honorable James Dixon
Thurston County Superior Court Judge

CP 351.

V. STANDARD OF REVIEW

Appellate review of constitutional issues is *de novo*. *State v. Mecham*, 186 Wn.2d 128, 137 (2016); *see also Ball v. State Dept. of*

Licensing, 113 Wn. App. 193, 197 (2002) (a challenge to the trial court's legal conclusions is reviewed by the Court of Appeals *de novo*); *State v. Moore*, 161 Wn.2d 880, 884–885 (2007) (where the findings of fact are unchallenged, conclusions of law are reviewed *de novo*).

The trial court made no findings of fact at all in this ruling because the facts were uncontroverted. The trial court certainly made no findings of fact contrary to our position upon which its decision relied. However, in an excess of caution, should it ever be suggested that any such findings of controverted facts were made, we hereby take exception to them.

VI. ARGUMENT

A. THE TRIAL COURT ERRED IN GRANTING THE STATE'S PETITION TO ENFORCE THE CID BECAUSE RESPONDING TO THE CID WOULD VIOLATE THE RIGHTS AGAINST SELF-INCRIMINATION OF BRELVIS AND BRUCE MESNEKOFF PROTECTED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION; ARTICLE I, SECTION 9 OF THE WASHINGTON CONSTITUTION; AND RCW 10.52.090.

The trial court erred in granting the State's motion because responding to the CID would violate Brelvis and Mr. Mesnekoff's rights under the Fifth Amendment to the United States Constitution as well as Article I, Section 9 of the Washington constitution.

To counsel's knowledge, no court of record has ever addressed the applicability of the Fifth Amendment to the United States Constitution;

Article I, Section 9 of the Washington constitution; and RCW 10.52.090 to the issuance of a CID under circumstances like those in this case.

1. The Privilege Against Self-Incrimination Is Protected By The Fifth Amendment; Article I, Section 9 Of The Washington Constitution; And RCW 10.52.090.

The Fifth Amendment provides that no person “shall be compelled in any criminal case to be a witness against himself.” U.S. CONST. Amend. V. The Fifth Amendment “protects a person . . . against being incriminated by his own compelled testimonial communications.” *Fisher v. United States*, 425 U.S. 391, 409 (1976). “[T]he basic purposes that lie behind the privilege against self-incrimination do not relate to protecting the innocent from conviction, but rather to preserving the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution ‘shoulder the entire load.’” *Tehan v. United States*, 382 U.S. 406, 415 (1966).

To receive the protection of the Fifth Amendment, a person’s statement or act must (1) be compelled; (2) be testimonial; and (3) incriminate the person in a criminal proceeding. *See United States v. Hubbell*, 530 U.S. 27, 34–35 (2000) (*Hubbell II*). A witness’s act of producing documents in response to a subpoena may have incriminating testimonial aspects and implicate a person’s Fifth Amendment right against

self-incrimination. *See Hubbell*, 530 U.S. at 36; *Fisher*, 425 U.S. at 410; *In re Grand Jury Subpoena Dated April 18, 2003*, 383 F.3d 905, 911 (9th Cir. 2004). The federal statute that defines the parameters of the privilege against self-incrimination and the immunity necessary to overcome an assertion of the privilege is found in the federal criminal code, at 18 U.S.C. §§ 6001–6005.

The Washington state constitutional provision concerning the privilege against self-incrimination is found in Article I, Section 9, which states that “No person shall be compelled in any criminal case to give evidence against himself”). The Washington state statute that defines the parameters of the privilege against self-incrimination and the immunity necessary to overcome an assertion of the privilege is found at RCW 10.52.090.

2. Washington Law Prohibits Compulsory Self-Incrimination Unless the Compulsion Order Guarantees Immunity

RCW 10.52.090 prohibits a court from compelling the answering of questions *or* the production of papers or documents that might incriminate the person *or* which might subject the person “to a penalty or forfeiture,” unless the compulsion order is accompanied by a concomitant grant of immunity (“but he or she shall not be prosecuted or subjected to a penalty

or forfeiture for or on account of any action, matter, or thing concerning which he or she shall so testify”). This statute states in pertinent part:

[A] witness shall not be excused from giving testimony tending to criminate himself or herself, **no person shall be excused from testifying or producing any papers or documents on the ground that his or her testimony may tend to incriminate or subject him or her to a penalty or forfeiture; but he or she shall not be prosecuted or subjected to a penalty or forfeiture for or on account of any action, matter or thing concerning which he or she shall so testify**, except for perjury or offering false evidence committed in such testimony.

RCW 10.52.090 (emphasis supplied).

This immunity provided under the state constitution and state statute is broader than the immunity conferred by the Fifth Amendment and 18 U.S.C. § 6002, which statute provides only that “no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the person in any criminal case. . . .” 18 U.S.C § 6002(3). Thus, while the federal statute only prohibits “use and fruits” immunity in a criminal case, the state statute prohibits use in a criminal prosecution *as well as the imposition of any penalty or forfeiture*. RCW 10.52.090.

3. Fundamental Constitutional And Statutory Principles Prohibiting Compelled Self-Incrimination Apply Not Only In Criminal Proceedings, But Also In Any Official Proceeding, Including Administrative Or Investigatory Proceedings Such As This Civil Investigative Demand.

Fundamental constitutional and statutory principles prohibiting compelled self-incrimination apply not only in criminal proceedings, but also in *any official proceeding*, including administrative or investigatory proceedings such as this Civil Investigative Demand:

But the power to compel testimony is not absolute. There are a number of exemptions from the testimonial duty, the most important of which is the Fifth Amendment privilege against compulsory self-incrimination. The privilege reflects a complex of our fundamental values and aspirations, and marks an important advance in the development of our liberty. *It can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory*[.]

Kastigar v. United States, 406 U.S. 441, 444 (1972) (emphasis supplied).

State law is in accord about the type of proceedings to which the privilege applies. These protections against self-incrimination apply with equal force to the refusal “to answer official questions,” *King v. Olympic Pipeline Co.*, 104 Wn. App. 338, 351 (2000), *as amended on reconsideration* (Feb. 14, 2001), “in any proceeding civil or criminal, administrative or judicial, investigatory or adjudicatory.” *Eastham v. Arndt*, 28 Wn. App. 524, 527 (1981).

4. Pursuant To Paragraph 3.9, The CID Is Directed At Mr. Mesnekoff Personally, As He Is A Present Owner, Manager, And Agent Of The Company.

Paragraph 3.9 of the CID explains that the Interrogatories and Requests for Production are directed not only at the Brelvis entity, but also at the individual persons who are “its principals,” “present or former owners, employees,” “officers, directors, agents, representatives,” “and any other persons or entities acting on behalf of” “Brelvis Consulting”:

3.9 “You,” “Your,” and “Brelvis” refer to Brelvis Consulting, LLC, whether doing business as The Student Loan Help Center, National Student Loan Help Center, or any other fictitious business name and any parent, affiliate, subsidiary, predecessor, successor or assignee of it, and its principals, operating divisions, present or former owners, employees, servants, officers, directors, agents, representatives, attorneys, accountants, independent contractors, distributors, and any other persons or entities acting on behalf of or under the direction, authorization or control of Brelvis Consulting, LLC, including any foreign or overseas affiliates.

CP 20.

Bruce Mesnekoff is the Managing Member of Brelvis, as indicated by the “MGRM” notation on the Florida Department of Corporations website. *See* CP 235–36. A Managing Member is a person who is a member (an owner of an LLC is identified as a “member”) of the company, and is also the manager. *See* CP 238–39. Indeed, the State conceded in its pleadings that Mr. Mesnekoff owns and operates Brelvis. *See* CP 4 at ¶ 1.2.

Therefore, pursuant to Paragraph 3.9, the CID is directed at Mr. Mesnekoff personally, as he is a present owner, manager, and agent of the company. *See* CP 20 (CID at ¶ 3.9).

5. The CID Requires Mr. Mesnekoff And Brelvis To Answer Interrogatories In Violation Of The Fifth Amendment; Article I, Section 9 Of The Washington Constitution; And RCW 10.52.090.

The CID sets forth 12 Interrogatories directed at Mr. Mesnekoff and Brelvis, and include questions inquiring as to Brelvis's corporate structure; the products and services offered; the source of leads for prospective clients; a list of every Washington consumer and the products or services provided; all owners, members and shareholders; the persons responsible for drafting and approving contracts with Washington customers; the persons responsible for determining and approving the amount of fees in Washington; identifying all Washington consumers who have formally or informally complained about the products and services; all current and former employees, agents, salespersons, and contractors; persons responsible for drafting and approving sales and marketing strategies; all steps taken to ensure compliance with local, state, and federal laws; and all steps taken to ensure all statements to potential customers are truthful. *See* CP 24–27.

Interrogatories are written questions. Answering questions such as these interrogatories implicates the core values which the privilege against self-incrimination protects. Compelling Mr. Mesnekoff and Brelvis to answer interrogatories is no different than asking them questions under oath at a deposition or hearing.

6. The Fundamental State and Federal Constitutional and Statutory Privilege Against Self-Incrimination Apply to Entities and Individual Persons.

The fundamental constitutional privilege against self-incrimination protected by the federal and state constitutions and RCW 10.52.090 applies to persons—including Mr. Mesnekoff—as well as entities, including Brelvis. Relying on *Braswell v. United States*, 487 U.S. 99 (1988), the State asserted in the trial court that constitutional rights do not apply to entities such as Brelvis. CP 103–04. A search of the cases that have cited *Braswell* indicates that no Washington state court has ever cited to *Braswell*, much less relied upon it.

More importantly, the preponderant weight of modern authority is clearly to the contrary. The United States Supreme Court has recently recognized that constitutional and statutory rights *are* extended to corporations in order to protect the rights of the owners, officers, and employees of the corporate entity:

A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the *people* (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people. For example, extending Fourth Amendment protection to corporations protects the privacy interests of employees and others associated with the company. Protecting corporations from government seizure of their property without just compensation protects all those who have a stake in the corporations' financial well-being.

Burwell v. Hobby Lobby Stores, Inc., 573 U.S. ___, 134 S. Ct. 2751, 2768 (2014) (emphasis in original); *see also Steele v. State ex. Rel. Gorton*, 85 Wn.2d 585, 592 (1975) (providing that the constitutional privacy protections of Article I, Section 7 do apply to corporations as well as individual persons).

The Supreme Judicial Court of Massachusetts has determined that the rule set forth in *Braswell* is a “fiction” incongruent with its state constitution:

The Commonwealth contends that we should adopt the rule enunciated in *Braswell v. United States*, 487 U.S. 99, 108 S.Ct. 2284, 101 L.Ed.2d 98 (1988). In that case the Supreme Court held that a custodian of corporate records cannot rely upon the Fifth Amendment privilege against self-incrimination. *Id.* 108 S.Ct. at 2295. The Court reasoned that the custodian acts only as a representative, and that his act, therefore, is deemed to be one of the corporation only and not an act of the individual. *Id.* **We decline to engage in such a fiction. The act of production is demanded of the witness and the possibility of self-incrimination is**

inherent in that act. The witness's status as a representative does not alter the fact that in so far as he is a natural person he is entitled to the protection of art. 12. **It would be factually unsound to hold that requiring *the witness* to furnish corporate records, the act of which would incriminate him, is not *his act*.** As we said in *Emery's Case*, 107 Mass. 172, 181 (1871), "[i]f the disclosure . . . would be capable of being used against himself . . . such disclosure would be an accusation of himself, within the meaning of the constitutional provision." The same is true here when the witness's act of production would incriminate him. **His status as custodian of the corporation's records does not require that he lose his individual privilege under art. 12.**

Com. v. Doe, 405 Mass. 676, 679–80, 544 N.E.2d 860, 862 (1989) (emphasis supplied).

The Massachusetts state constitutional provision at issue in the *Doe* case is virtually identical to the Washington provision. Article 12 of the Massachusetts constitution states, *inter alia*, that, "No subject shall be held to . . . furnish evidence against himself." Mass. Const. Pt. 1, art. XII. Article I, Section 9 of the Washington constitution states: "No person shall be compelled . . . to give evidence against himself" Wash. Const. art. I, § 9.

This Court should adopt the holding of the Supreme Judicial Court of Massachusetts in *Doe*, when it held: "Thus, we hold that the witness cannot be held in contempt for invoking his privilege under art. 12 in so far as the very act of production demanded of him is protected." *Doe*, 405 Mass. at 681.

B. THE TRIAL COURT ERRED IN GRANTING THE STATE'S PETITION TO ENFORCE THE CID BECAUSE THE CID ALSO COMPELS AN ACT OF PRODUCTION IN VIOLATION OF THE FIFTH AMENDMENT; ARTICLE I, SECTION 9 OF THE WASHINGTON CONSTITUTION; AND RCW 10.52.090.

To receive the protection of the Fifth Amendment, a person's statement or act must (1) be compelled; (2) be testimonial; and (3) incriminate the person in a criminal proceeding. *See United States v. Hubbell*, 530 U.S. 27, 34–35 (2000) (*Hubbell II*). As articulated by the Massachusetts court in *Doe* (*see supra*) a witness's act of producing documents in response to a subpoena may have incriminating testimonial aspects and implicate a person's Fifth Amendment right against self-incrimination. *See Doe*, 405 Mass. at 681; *Hubbell*, 530 U.S. at 36; *Fisher*, 425 U.S. at 410; *In re Grand Jury Subpoena Dated April 18, 2003*, 383 F.3d 905, 911 (9th Cir. 2004).

The act of producing voluntarily prepared papers may itself be protected by the Fifth Amendment because the “act of production” may convey information as to the existence, authenticity, and possession of evidence, as well as the individual's belief that any evidence actually produced matches a subpoena's terms. *See Fisher*, 425 U.S. at 410.

By producing documents in compliance with a subpoena, the witness admits that the documents exist, are in his possession or control, and are authentic. *See Hubbell II*, 530 U.S. at 36.

These types of admissions implicitly communicate statements of fact that may lead to incriminating evidence. *See id.* at 36, 38.

In re Grand Jury Subpoena Dated April 18, 2003, 383 F.3d at 909–10; *see also United States v. Doe*, 465 U.S. 605, 611–12 (1984) (the act of producing a sole proprietor’s voluntarily prepared business records involves compelled testimonial communications as to the existence, control and authenticity of the documents, triggering a Fifth Amendment privilege).

Whether, in a particular case, an act of production is protected by the Fifth Amendment “is a fact-intensive inquiry.” *In re Grand Jury Subpoena Dated April 18, 2003*, 383 F.3d at 910; *see also Fisher*, 425 U.S. at 410 (the resolution of whether documents are testimonial “depends on the facts and circumstances of particular cases or classes thereof”). To respond to this CID’s request for production of documents would clearly require Mr. Mesnekoff and Brelvis to “admit[] that the documents exist, are in his possession or control, and are authentic,” *In re Grand Jury Subpoena Dated April 18, 2003*, 383 F.3d at 909, and “also would indicate [Mr. Mesnekoff’s] belief that the papers are those described in the subpoena,” *Fisher*, 425 U.S. at 410.

Indeed, as discussed above in § A.6., this was the precise issue addressed in *Com. v. Doe*, 405 Mass. 676, 679–80, 544 N.E.2d 860, 862 (1989), where the Massachusetts court, interpreting a nearly identical state

constitutional provision, recognized that the business representative to whom the records request was directed possessed an “act of production” privilege: “the witness cannot be held in contempt for invoking his privilege under art. 12 in so far as the very act of production demanded of him is protected.” *Id.* at 681.

That Mr. Mesnekoff’s knowledge concerning any documents such as those called for in the CID—directly implicated in the act of producing them—might be incriminating or subject him to a “penalty or forfeiture,” *see* RCW 10.52.090, is clear. The Attorney General is apparently conducting an investigation into “illegal acts into which [Appellant’s] conduct falls: ‘Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.’” *See* CP 8 (Petition at ¶ 5.6) (citing RCW 19.86.020 “Unfair competition, practices, declared unlawful”). This statute provides comprehensive penalties and forfeitures for violations of its terms. *See, e.g.*, RCW 19.86.140 (setting forth various financial forfeitures and penalties).

To overcome a validly asserted act of production privilege, a grant of immunity is necessary to compel production. *United States v. Doe*, 465 U.S. 605, 617 (1984) (“The act of producing the documents at issue in this case is privileged and cannot be compelled without a statutory grant of use immunity pursuant to 18 U.S.C. §§ 6002 and 6003.”). Title 18 U.S.C.

§ 6003 authorizes a district court to issue an order requiring an “individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination.” Because “a grant of immunity need be only as broad as the privilege against self-incrimination,” a grant “need only protect the witness from the self-incrimination that might accompany the act of producing his business records.” *Doe*, 465 U.S. at 617 n.17.

Here, the trial court erred because its order compels an act of production without providing Appellants immunity, as required by RCW 10.52.090.

C. THE TRIAL COURT ERRED IN GRANTING THE STATE’S PETITION TO ENFORCE THE CID BECAUSE A *GUNWALL* ANALYSIS FAVORS FINDING THAT ARTICLE I, SECTION 9 PROVIDES GREATER PROTECTIONS THAN THE FIFTH AMENDMENT IN THIS CONTEXT.

1. This Issue is Ripe for a *Gunwall* Analysis

In *State v. Gunwall*, 106 Wn.2d 54 (1986), the Washington Supreme Court established the following set of factors to consider in determining whether, in a given situation, the state constitution extends broader rights than the federal constitution: (1) the textual language of the constitutional provisions at issue; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern. *Id.* at 59. It does not appear that any court

has ever performed a *Gunwall* analysis to address whether the state constitution provides greater protections than the Fifth Amendment in this particular context.

In a markedly different fact pattern, the Washington Supreme Court examined the *Gunwall* factors in *State v. Russell*, 125 Wn.2d 24, 62 (1994), and determined that “on balance, we conclude that the *Gunwall* factors do not support extending greater protection through Const. art. 1, § 9 than that provided by the federal constitution in the present context.” However, the Court also stated that:

A determination that a given state constitutional provision affords enhanced protection **in a particular context** does not necessarily mandate such a result in a different context. *State v. Boland*, 115 Wash.2d 571, 576, 800 P.2d 1112 (1990). Similarly, **when the court rejects an expansion of rights under a particular state constitutional provision in one context, it does not necessarily foreclose such an interpretation in another context.**

Id. at 58 (emphasis supplied).

In fact, *Russell* was a very different case from the instant case. There, the Court considered the admissibility of the fruits of an un-Mirandized confession related to a murder suspect’s statements to police after arrest on an unrelated warrant. *Russell*, 125 Wn.2d at 55–56; 61–62. *Russell*’s analysis of the *Gunwall* factors on those facts, in a case involving *Miranda* and the Fruit of the Poisonous Tree doctrine, have little bearing on

the instant case, which involves written interrogatories and a request to produce documents.

2. Application of the *Gunwall* Factors to this Case Distinguishes this Case from *Russell* and Favors Finding Greater Protections under the State Constitution

a. Factors 1 and 2—Constitutional Texts

In the context of this case, the differences in the texts between the state and federal constitutions are significant. The *Russell* court juxtaposed the differences:

Under the state constitution “[n]o person shall be compelled in any criminal case to *give evidence against himself* . . .”. (Italics ours.) Const. art. 1, § 9. The parallel federal provision states “nor shall [any person] be compelled in any criminal case to *be a witness against himself* . . .”. U.S. Const. amend. 5. Thus, the difference is between “giving evidence” (state constitution) and “being a witness” (federal constitution).

Id. at 59. In *Russell*, in the context of a *Miranda*/Fruit of the Poisonous Tree fact pattern, those differences were without meaning. *Russell* 125 Wn.2d at 59.

But here, in the context of this CID, which includes written interrogatories, a request to produce documents, and which implicates “act of production” testimonial statements, the differences *are* meaningful. “[G]iving evidence against himself”—i.e., producing documents and papers—is exactly what the government sought by the service of the CID. *Cf. Com. v. Doe*, 405 Mass. 676, 679–80, 544 N.E.2d 860, 862 (1989)

(finding that the Massachusetts constitution provides greater protections in the act of production context than the Fifth Amendment, where Article 12 of the Massachusetts constitution states, *inter alia*, that, “No subject shall be held to . . . furnish evidence against himself.” Mass. Const. Pt. 1, art. XII.). That the CID seeks more than compelling a person to “be a witness against himself” favors a finding that the Washington constitution’s broader language has a meaningful difference in this context.

b. Factor 3—Constitutional History

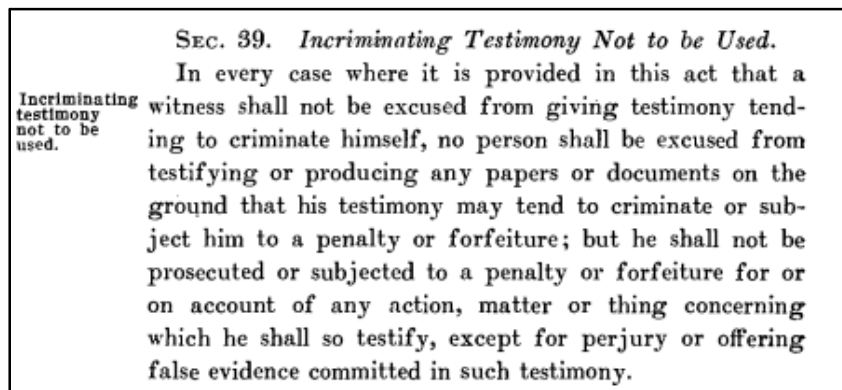
“The fact that Washington based its Declaration of Rights on the Bills of Rights of other states that, in turn, did not rely on the federal constitution, but on common law, supports an independent reading of the state constitution.” *State v. Earls*, 116 Wn.2d 364, 392 (1991) (Utter, J., dissenting). Indeed, referring to Justice Utter’s dissent in *Earls*, the *Russell* Court noted that “[t]his recognition certainly has some force to it.” *Russell*, 125 Wn.2d at 60. Ultimately, the *Russell* Court declined to give that factor significant weight, noting that the framers did not end up using language that “differed in any great degree from that used in the federal constitution.” *Id.* at 60.

But as discussed above, the framers did use language that differed from the federal constitution in a meaningful way *in this particular context* involving the State’s CID. Therefore, given the textual language selected

by the framers, the constitutional history *does* support a finding of broader protections under Article I, Section 9.

c. Factor 4—Preexisting State Law

The fourth factor—preexisting state law—strongly favors finding that Article I, Section 9 provides greater protections than the Fifth Amendment. RCW 10.52.090 expressly protects persons compelled to produce “papers or documents.” This has been law since at least 1909:



Wash. Laws 1909, ch. 249, § 39. This stands in some contrast to the text and pre-existing law of the Fifth Amendment, which does not have this express text and deep history regarding the government compulsion of the production of documents.

d. Factor 5—Structural Differences

The fifth factor—structural differences—always supports a finding that Article I, Section 9 provides greater protections:

The state constitution *limits* powers of state government, while the federal constitution *grants* power to the federal government. *Gunwall*, 106 Wash.2d at 66, 720 P.2d 808.

This difference favors an independent state interpretation in every *Gunwall* analysis.

Russell, 125 W.2d at 61 (emphasis in original).

e. Factor 6—National Versus State or Local Concern

Finally, the sixth factor looks at whether the particular issue is a matter of state or local concern. In *Russell*, for example, the Court noted “the specific exclusionary rule here at issue is peculiarly federal in nature. It is based on a federal case [*Miranda*] interpreting the federal constitution.” *Russell*, 125 Wn.2d at 62 (internal citations omitted).

But here, the issue is a state CID issued by the Washington State Attorney General’s Office to investigate potential violations of a particular and peculiar *state* law concerning student loan debt servicing. This is not a uniformly applied national statute. This is therefore distinctively a matter of state or local concern. This factor weighs heavily in favor of an independent analysis under the state constitutional provision protecting the right against self-incrimination.

Weighing all of the factors, this Court should conclude that Article I, Section 9 provides greater protections than the Fifth Amendment and should conclude that—even if the federal constitutional provision was not violated—compelling the answering of the interrogatories and compelling

the act of production of these papers and records would violate Article I, Section 9 of the Washington constitution.

D. THE TRIAL COURT ERRED IN GRANTING THE STATE’S PETITION TO ENFORCE THE CID BECAUSE COMPELLING COMPLIANCE WITH THIS CID—THE ANSWERING OF INTERROGATORIES AND PRODUCTION OF DOCUMENTS AND PAPERS—WOULD VIOLATE RCW 10.52.090 BECAUSE IT WOULD SUBJECT MR. MESNEKOFF AND BRELVIS TO PENALTIES AND FORFEITURES, A RESULT CLEARLY PROHIBITED BY THE STATUTE.

Compelling compliance with this CID would also quite clearly violate RCW 10.52.090.² This statute prohibits a court from compelling the answering of questions *or* the production of papers or documents that might

² The State’s suggestion in the trial court that RCW 10.52.090 “applies only to criminal offenses including, among others, rape and burglary,” CP 114 (State’s Reply at ¶ 1.12), is plainly incorrect. The “Reviser’s Note” to RCW 10.52.090 states that “this act” references RCW 9.01.120, which encompasses statutes from a broad variety of topics, including the following Titles: Title 9 (Crimes and Punishments (including RCW 9.24.050, regarding the false report of a corporation)); Title 10 (Criminal Procedure); Title 19 (Business Regulations); Title 22 (Warehousing and Deposits); Title 26 (Domestic Relations), Title 36 (Counties), Title 40 (Public Documents, Records, and Publications), Title 42 (Public Officers and Agencies), Title 49 (Labor Regulations), Title 59 (Landlord and Tenant), Title 66 (Alcoholic Beverage Control), Title 68 (Cemeteries, Morgues, and Human Remains), Title 69 (Food, Drugs, Cosmetics, and Poisons), Title 70 (Public Health and Safety), Title 71 (Mental Illness), Title 76 (Forests and Forest Products), Title 81 (Transportation), and Title 88 (Navigation and Harbor Improvements).

Furthermore, the fact that the state statute defining the parameters of the privilege against self-incrimination and the immunity necessary to overcome an assertion of the privilege is found in Title 10 of the state laws is fully consistent with the fact that the federal statute that defines the parameters of the privilege against self-incrimination and the immunity necessary to overcome an assertion of the privilege is found in the federal criminal code, at 18 U.S.C. §§ 6001–6005.

incriminate the person *or* might subject the person “to a penalty or forfeiture,” unless the compulsion order is accompanied by a concomitant grant of immunity (“but he or she shall not be prosecuted or subjected to a penalty or forfeiture for or on account of any action, matter, or thing concerning which he or she shall so testify”).

This statute states in pertinent part:

[A] witness shall not be excused from giving testimony tending to criminate himself or herself, **no person shall be excused from testifying or producing any papers or documents on the ground that his or her testimony may tend to incriminate or subject him or her to a penalty or forfeiture; but he or she shall not be prosecuted or subjected to a penalty or forfeiture for or on account of any action, matter or thing concerning which he or she shall so testify**, except for perjury or offering false evidence committed in such testimony.

RCW 10.52.090 (emphasis supplied).

The declaration of the Assistant Attorney General (AAG) that accompanies the Petition, along with a review of the Attorney General’s website, demonstrates quite clearly that the Attorney General’s Office is attempting to compel Mr. Mesnekoff and Brelvis to produce these “papers and documents” *in order to* “subject him. . . to a penalty or forfeiture.” *Id.*; *compare* Nelson Dec. at CP 13–15 (listing King County Superior Court “enforcement actions against more than a dozen companies operating in the student loan debt adjustment industry and offering services similar to those

of Brelvis Consulting, LLC”), *with* the Attorney General’s website at <http://www.atg.wa.gov/news/news-releases/ag-ferguson-surpasses-1-million-student-borrower-recoveries> (listing the student loan companies against whom the Attorney General’s Office has sought and obtained penalties and forfeitures (“Attorney General Bob Ferguson announced today that his office has recovered more than \$1.2 million in the last year cracking down on student loan debt adjusters . . .”). A side-by-side comparison of the AAG’s declaration in this matter listing student loan company enforcement actions and the AG’s list of student loan companies who have suffered penalties and forfeitures pursuant to the AG’s current campaign reveals virtual identity:

Nelson Declaration CP 13–15	Attorney General’s website http://www.atg.wa.gov/news/news-releases/ag-ferguson-surpasses-1-million-student-borrower-recoveries																																		
<p>A. <i>State of Washington v. Irvinwebworks, Inc., d/b/a Student Loan Processing, US; and James E. Krause</i>, King County Superior Court Case No. 16-2-01685-5 SEA.</p> <p>B. <i>State of Washington v. SLRS, LLC, d/b/a Student Loan Relief Services</i>, King County Superior Court Case No. 16-2-01685-5 SEA.</p> <p>C. <i>State of Washington v. Student Debt Solutions, LLC</i>, King County Superior Court Case No. 16-2-06497-3 SEA.</p> <p>D. <i>State of Washington v. United Advisors Group, LLC</i>, King County Superior Court Case No. 16-2-06399-3 SEA.</p> <p>E. <i>State of Washington v. American Student Loan Consolidators LLC</i>, King County Superior Court Case No. 16-2-06397-7 SEA.</p> <p>F. <i>State of Washington v. Debt Relief Pros, Inc d/b/a Student Debt Relief</i>, King County Superior Court Case No. 16-2-06393-4 SEA.</p> <p>G. <i>State of Washington v. DFL International, LLC</i>, King County Superior Court Case No. 16-2-07927-0 SEA.</p> <p>H. <i>State of Washington v. National Student Loan Service, Inc</i>, King County Superior Court Case No. 15-2-31227-8 SEA.</p> <p>I. <i>State of Washington v. LIBRE Technologies, Inc. d/b/a Student Loan Service and Student Loan Service, US</i>, King County Superior Court Case No. 16-2-11718-2-SEA.</p> <p>J. <i>State of Washington v. D.O.R.M. Group Inc., d/b/a Student Loan Service Managers, National Secure Processing and SLS Managers</i>, King County Superior Court Case No. 16-2-11718-2-SEA.</p> <p>K. <i>State of Washington v. Student Services, LLC, d/b/a Student Loan Services and SLA Help</i>, King County Superior Court Case No. 16-2-19286-6 SEA.</p> <p>L. <i>State of Washington vs. American Document Preparation and The Student Resolution Center, LLC</i>, King County Superior Court Case No. 16-2-27101-1 SEA.</p> <p>M. <i>State of Washington vs. SLAC, Inc. d/b/a Student Loan Assistance Center and GOSLAC.com</i>, King County Superior Court Case No. 16-2-27101-1 SEA.</p> <p>N. <i>State of Washington vs. Miller Student Loan Consulting LLC</i>, King County Superior Court Matter No. 16-2-03524-34.</p> <p>O. <i>State of Washington v. Prima Processing Solutions, LLC</i>, King County Superior Court Case No. 17-2-03474-6 SEA.</p>	<p>Attorney General’s Office Student Loan Adjuster Cases</p> <table> <tr> <th>Adjuster</th><th>Washington Borrowers</th></tr> <tr> <td>Irvine Web Works Inc./Student Loan Processing</td><td>87</td></tr> <tr> <td>SLRS LLC/Student Loan Relief Services</td><td>23</td></tr> <tr> <td>Student Debt Solutions LLC</td><td>21</td></tr> <tr> <td>United Advisors Group LLC</td><td>158</td></tr> <tr> <td>American Student Loan Consolidators LLC</td><td>27</td></tr> <tr> <td>Debt Relief Pros Inc./Student Debt Relief</td><td>78</td></tr> <tr> <td>DFL International LLC/US Direct Student Loan Services</td><td>30</td></tr> <tr> <td>National Student Loan Solutions Inc.</td><td>1</td></tr> <tr> <td>LIBRE Technologies Inc./Student Loan Service</td><td>323</td></tr> <tr> <td>DORM Group Inc./Student Loan Service Managers</td><td>77</td></tr> <tr> <td>Student Services LLC/Student Loan Aid</td><td>80</td></tr> <tr> <td>American Document Processing Services LLC/The Student Resolution Center LLC</td><td>6</td></tr> <tr> <td>SLAC Inc./Student Loan Assistance Center</td><td>422</td></tr> <tr> <td>H&S Marketing LLC/Student Loan Counsel</td><td>268</td></tr> <tr> <td>Miller Student Loan Consulting LLC</td><td>3</td></tr> <tr> <td>Totals</td><td>1,604</td></tr> </table>	Adjuster	Washington Borrowers	Irvine Web Works Inc./Student Loan Processing	87	SLRS LLC/Student Loan Relief Services	23	Student Debt Solutions LLC	21	United Advisors Group LLC	158	American Student Loan Consolidators LLC	27	Debt Relief Pros Inc./Student Debt Relief	78	DFL International LLC/US Direct Student Loan Services	30	National Student Loan Solutions Inc.	1	LIBRE Technologies Inc./Student Loan Service	323	DORM Group Inc./Student Loan Service Managers	77	Student Services LLC/Student Loan Aid	80	American Document Processing Services LLC/The Student Resolution Center LLC	6	SLAC Inc./Student Loan Assistance Center	422	H&S Marketing LLC/Student Loan Counsel	268	Miller Student Loan Consulting LLC	3	Totals	1,604
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The website news release, which is a list of student loan companies against whom the Attorney General’s Office *has* obtained penalties and forfeitures, speaks directly and persuasively about the intent of the Attorney General in issuing the CID in the Brelvis case.

The trial court should, therefore, have denied the petition. In the alternative, pursuant to RCW 10.52.090, the trial court should have granted Mr. Mesnekoff and Brelvis immunity from criminal prosecution and also from the imposition of any penalties and forfeitures on account of any compelled compliance.

E. THE TRIAL COURT ERRED IN GRANTING THE STATE'S PETITION TO ENFORCE THE CID BECAUSE THE CID IS AN UNREASONABLE SEARCH AND SEIZURE IN VIOLATION OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 7 OF THE WASHINGTON CONSTITUTION.

The Attorney General's authority to investigate perceived violations of Washington law is not without other limitations. The Fourth Amendment protects against unreasonable searches and seizures:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV. A valid search must be based upon a warrant issued by a neutral and detached magistrate. *See Johnson v. United States*, 333 U.S. 10, 14 (1948) ("When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent").

While the CID by its own terms applies directly to Mr. Mesnekoff, *see* at CP 18–33, it is “well established” that the Fourth Amendment also protects corporations and businesses. *Steele v. State ex. Rel. Gorton*, 85 Wn.2d 585, 592 (1975).

A CID constitutes an unreasonable search and seizure in violation of the Fourth Amendment if the CID is not within the authority of the agency, is too indefinite, or if the information sought is not reasonably relevant to the investigation. *See Steele*, 85 Wn.2d at 594. A CID may not be issued arbitrarily. *See id.* at 595.

1. The CID Is An Unreasonable Search And Seizure In Violation Of The Fourth Amendment To The United States Constitution.

Here, the CID is not reasonably relevant to the claimed basis for the State’s investigation. The State contends that it is “investigating a consumer complaint involving Respondent that relates to its misrepresentations about student loan forgiveness.” CP 5; *see also id.* at CP 9 (stating that the CID was issued “in response to a Washington consumer complaint”). Yet the CID was issued 36 days *before* any customer complaint was ever made, and thus that complaint cannot possibly provide the foundation for the CID.

The State also states that it is investigating “potential violations of Washington’s Debt Adjusting Act and Consumer Protection Act.” CP 5. Yet, again, it appears that the only basis for the investigation is *one* customer

complaint that was made *after* the CID was issued and *one* non-customer complaint prior to the issuance of the CID. This is quite different from *Steele*, where the court noted that “the record discloses that an adequate foundation for the investigation existed since the Attorney General had received various complaints with respect to the operation of” the business being investigated. *See id.* at 595. In *Steele*, there had been a number of customer complaints filed *prior* to issuance of the CID.

Moreover, to the extent that the one consumer complaint can provide an “adequate foundation” for an investigation, the 16-page CID issued here seeks records and information far beyond what is reasonably necessary to investigate and resolve this single complaint.

Additionally, it is clear that the State has erroneously conflated the “National Student Loan Help Center” with “The Student Loan Help Center.” *See* CP 20 (CID at ¶ 3.9). Brelvis Consulting and *The Student Loan Help Center* are not in any way affiliated with *The National Student Loan Help Center*. A cursory review of internet traffic by way of a search engine reveals that the *National Student Loan Help Center* is indeed an entity that has been the subject of numerous complaints across the country. But Brelvis is *not* the National Student Loan Help Center that has been so roundly criticized in the media. Brelvis (and The Student Loan Help

Center) is a completely different entity, not connected to the National Student Loan Help Center. CP 195–196.

Thus, to the extent that the State is basing its investigation of The Student Loan Help Center on complaints about the *National* Student Loan Help Center, the State is mistaken. This conflation of the different entities further demonstrates the lack of an adequate foundation for the State’s investigation, and the necessity of the intercession of the judgment of a neutral and detached magistrate prior to the issuance of such a comprehensive administrative intrusion on the business affairs of Brelvis and Mr. Mesnekoff.

Accordingly, this Court should find that the trial court erred in granting the petition to enforce the CID, because the CID constitutes an unreasonable search and seizure in violation of the Fourth Amendment.

2. The CID Is An Unwarranted Intrusion Into Private Affairs Without Authority Of Law, In Violation Of Article I, Section 7 Of The Washington Constitution.

Even if the Court finds that the CID passes muster under the Fourth Amendment, it must consider whether enforcement of the CID is authorized under Article I, Section 7 of the Washington Constitution. Notably, *Steele* was decided in 1975—eleven years before the Washington Supreme Court first determined that, in certain contexts, our state constitution provides

greater protections against unreasonable searches and seizures than does the Fourth Amendment. *See Gunwall, supra*. Since *Gunwall*, courts have repeatedly analyzed and compared the Fourth Amendment and Article I, Section 7 of the Washington Constitution. As of this time:

It is now well settled that the protections guaranteed by article I, section 7 of the state constitution are qualitatively different from those provided by the Fourth Amendment to the United States Constitution. *City of Seattle v. McCready*, 123 Wash.2d 260, 267, 868 P.2d 134 (1994). Once this court has determined that a particular provision of the state constitution has an independent meaning using the factors outlined in *Gunwall*, it need not reconsider whether to apply a state constitutional analysis in a new context. *State v. Ladson*, 138 Wash.2d 343, 348, 979 P.2d 833 (1999). **Similarly, it is well established that article I, section 7 may provide greater protections than those afforded by the Fourth Amendment.** *State v. Simpson*, 95 Wash.2d 170, 178, 622 P.2d 1199 (1980). . . .

State v. McKinney, 148 Wn.2d 20, 26 (2002) (emphasis added); *see also State v. Hinton*, 179 Wn.2d 862, 868 (2014) (“It is well established that Article I, section 7 is qualitatively different from the Fourth Amendment and provides greater protections.”).

To determine whether a challenge under Article I, Section 7 requires a different outcome than a Fourth Amendment challenge, the court must examine:

whether the language of the state constitutional provision and its prior interpretations actually compel a particular result. *McCready*, 123 Wash.2d at 267, 868 P.2d 134.

State v. McKinney, 148 Wn.2d at 26.

To counsel's knowledge, no court of record has ever addressed the applicability of Article I, Section 7 to the issuance of a CID—without the intercession of a neutral judge—under circumstances like those in this case.

a. Business records and information are “private affairs” subject to state constitutional protections.

Article I, Section 7 provides that “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Wash. Const. Art. I, § 7. “Private affairs” are “privacy interests which citizens of this state have held, and should be entitled to hold, safe from government trespass absent a warrant.” *State v. McKinney*, 148 Wn.2d 20, 27 (2002) (citation omitted).

Business records are the type of private affairs that are subject to protection from government interference. As explained by preeminent legal scholar Thomas Cooley in his treatise on Constitutional law:

It is justly assumed that every man may have secrets pertaining to his business, or his family or social relations, to which his books, papers, letters, or journals may bear testimony, but with which the public, or any individuals of the public who may have controversies with him, can have no legitimate concern; and if they happen to be disgraceful to him, they are nevertheless his secrets, and are not without justifiable occasion to be exposed.

Thomas M. Cooley, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW 210 (1880), *cited in* Associate Chief Justice Charles W. Johnson & Scott P. Beetham, *The Origin of Article I, Section 7 of the Washington State*

Constitution, 31 SEATTLE U. L. REV. 431, 467 n.88 (2008) (emphasis supplied).

The Washington Supreme Court has determined that even discarded business records are the type of private affairs that are not subject to warrantless searches and seizures under the Washington constitution:

People reasonably believe that police will not indiscriminately rummage through their trash bags to discover their personal effects. **Business records**, bills, correspondence, magazines, tax records, and other telltale refuse can reveal much about a person's activities, associations, and beliefs.

State v. Boland, 115 Wn.2d 571, 578 (1990) (quoting *State v. Tanaka*, 67 Haw. 658, 662, 701 P.2d 1274 (1985)) (emphasis supplied) (finding that warrantless searches of garbage are impermissible under Article I, Section 7).

The 16-page CID at issue here, consisting of 12 Interrogatories and 13 Requests for Production, seeks extensive business records and information from Brelvis and Mr. Mesnekoff. Brelvis and Mr. Mesnekoff have a distinct privacy interest in this information.

b. The CID does not provide “authority of law” to compel production of Brelvis’s business records.

Because the State seeks to intrude into Brelvis and Mr. Mesnekoff’s private affairs, it must have authority of law to justify the intrusion. “Authority of law” requires a valid warrant, or a recognized exception to

the warrant requirement. *See State v. Budd*, 185 Wn.2d 566, 572 (2016). The exceptions to the warrant requirement fall into several categories: “consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view, and *Terry* investigative stops.” *State v. Hendrickson*, 129 Wn.2d 61, 71 (1996). None of these exceptions apply here.

The State contends that RCW 19.86.110 provides the authority to the government to issue the CID and obtain the information requested. CP 8–9 (Petition). Yet when the information the government seeks is subject to the protections of Article I, Section 7—as it is here—the authority afforded by RCW 19.86.110 is insufficient. The trial court thus erred when it determined that the CID did not violate Article I, Section 7 of the Washington constitution.

F. THE TRIAL COURT ERRED IN GRANTING THE STATE’S PETITION TO ENFORCE THE CID—AND IN DENYING APPELLANT’S MOTION FOR RECONSIDERATION—BECAUSE BRELVIS AND MR. MESNEKOFF DO NOT FORFEIT THEIR CONSTITUTIONAL RIGHTS BY FAILING TO BRING A PETITION TO SET ASIDE WITHIN THE 20-DAY TIME PERIOD SET FORTH IN RCW 19.86.110.

At the hearing on this matter, the trial court indicated that its decision relied in part upon the 20-day time period set forth at RCW 19.86.110(8). RP 24. That provision states, in pertinent part:

At any time before the return date specified in the demand, or within twenty days after the demand has been served, whichever period is shorter, a petition to extend the return date for, or to modify or set aside a demand issued pursuant to subsection (1) of this section, stating good cause, may be filed in the superior court for Thurston county, or in such other county where the parties reside. . .

RCW 19.86.110(8). This is not a valid reason for the trial court to have granted the State's petition.

First, the statute is stated in the permissive, i.e., “*may* be filed.” The use of the permissive “*may*” indicates that compliance is not mandatory or obligatory—RCW 19.86.110 uses the word “*shall*” 16 times throughout the statute, but *not* in this instance. *See, e.g., Scannell v. City of Seattle*, 97 Wn.2d 701, 704 (1982), *amended*, 97 Wn.2d 701 (1983) (“Where a provision contains both the words ‘*shall*’ and ‘*may*,’ it is presumed that the lawmaker intended to distinguish between them, ‘*shall*’ being construed as mandatory and ‘*may*’ as permissive”).

Second, RCW 19.86.110(8) does not prescribe any penalty for a respondent's failure to bring such petition within 20 days of receiving the CID. No court has ever interpreted this provision and found that a respondent waived his privilege against self-incrimination because he failed to bring a petition within the requisite time period. To the contrary, the Washington Supreme Court has upheld the dismissal of a petition to enforce a CID even where the respondent had not brought his own petition to set

aside the CID. In *Dick v. Attorney General*, 83 Wn.2d 684 (1974), the petitioner brought a petition to enforce the CID after the respondent failed to comply with the CID. After a hearing in superior court, the trial court ordered him to produce the requested records. *Id.* at 685. However, the Court of Appeals reversed the trial court, and the Washington Supreme Court affirmed the Court of Appeals' judgment. *Id.* at 685, 689. This resulted even though the respondent never brought a motion to set aside the CID, but instead merely responded to petitioner's petition to enforce. *See id.* at 685.

Thus, while a person upon whom a CID is served may proactively seek to quash a CID by originating an action in Superior Court, there is no authority for the proposition that failure to initiate an original action forfeits any constitutional rights, or results in any penalty whatsoever. The statute can be fairly read to permit the person upon whom the CID is served to await action by the Attorney General to present his response in opposition if the Attorney General chooses to seek to enforce the CID by an original action.

VII. CONCLUSION

The State's CID violates fundamental state and federal constitutional rights, including the right to be free from compelled self-incrimination and the right to be free from unreasonable searches and

seizures at the hands of the State. These rights form the bedrock of our criminal justice system and constitute cherished individual liberties, particularly here in the State of Washington.

The State Attorney General's Office and the CID process do not operate outside the sphere of these fundamental constitutional protections. The CID compels Appellants to answer questions and produce documents in violation of the privilege against self-incrimination protected by the Fifth Amendment and Article I, Section 9. The CID violates RCW 10.52.090, which prohibits a court from compelling a person to answer questions that might incriminate the person or that might subject the person to a penalty, unless the compulsion order guarantees immunity. The CID violates the prohibition against unreasonable searches and seizures, protected by the Fourth Amendment and Article I, Section 7, because it contravenes the basic constitutional rule that the Government cannot search a person's private papers without a finding of probable cause and a warrant issued by a neutral and detached magistrate.

For all these reasons, this Court should find that the trial court erred when it granted the petition to enforce the CID and denied the appellants's motion for reconsideration.

Dated this 21st day of September, 2017.

s/ Peter Offenbecher

Peter Offenbecher, WSBA No. 11920
Erin Curtis Newton, WSBA No. 38029
SKELLENGER BENDER, P.S.
Attorneys for Brelvis Consulting, LLC

CERTIFICATE OF SERVICE

I, Jule Sprenger, certify that on September 21, 2017, I served a true and correct copy of the foregoing document via electronic mail on the following party:

John A. Nelson, WSBA No. 45724
Assistant Attorney General
800 5th Ave Ste 2000
Seattle, WA 98104
johnn2@atg.wa.gov

Attorney for Respondent

DATED this 21st day of September, 2017, at Seattle, Washington.

s/ Jule Sprenger
Jule Sprenger
SKELLENGER BENDER, P.S.
Paralegal

SKELLENGER BENDER, P.S.

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